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HUMANITARIAN OPERATIONS AND OPERATIONAL LAW:
NEW "HOOPLA" FOR THE COMMANDER

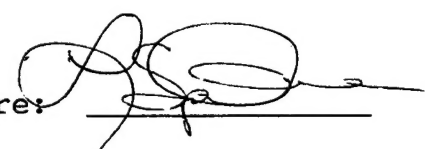
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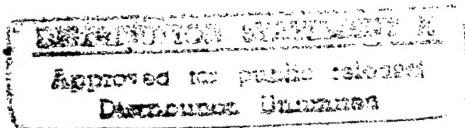
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The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract of

HUMANITARIAN OPERATIONS AND OPERATION LAW:
NEW HOOPLA FOR THE COMMANDER

The disappearance of a large conventional military threat, coupled with operations in areas where the most prevalent threats to human life erupt from within, rather than between existing states, has resulted in military operations that do not fit within previously recognized categories of international armed conflicts. Moreover, there is an increasing tendency to blur the dichotomy between international and internal armed conflicts, and the distinction between the law of war and human rights law. Clarity of these terms and legal principles is required to correctly determine the constraints applicable to contemporary military operations. This paper reviews the law of war and human rights law, and concludes with an examination of humanitarian operations-operational law (HOOPLA) and its impact on the commander.

BACKGROUND CASES

On December 7, 1945, a special military commission established by the United States found General **Tomoyuki Yamashita** guilty (under a theory of command responsibility) of the laws of war, and sentenced him to death by hanging. The charge against General Yamashita read: "Between October 9, 1944 and September 2, 1945, while Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, General Tomoyuki Yamashita failed to discharge his duty as commander to control the operations of the members of his command, thus permitting them to commit brutal atrocities and other high crimes against the people of the United States, its allies, and dependencies. Specific charges included the murder, rape, and torture of over 32,000 Filipino civilians and captured Americans. In re Yamashita, 327 U.S. 1 (1946).

On March 16, 1968, infantrymen from Company C, 1st Battalion, 20th Infantry of the 11th Infantry Brigade, commanded by Captain **Ernest R. Medina**, U.S. Army, swept into My Lai Hamlet Number 4, South Vietnam, with orders to "waste" the entire village of 700 civilians. Senseless brutality began almost immediately: 70 villagers were pushed into a ditch and shot en masse; a two-year old boy fleeing from the ditch was shot; a 15-year old girl was gang-raped; an infirm old woman and a Buddhist monk praying at her bedside, were shot; and so on. The official body count was placed at 128, but the actual death toll was by all accounts, far higher. Of the dozens of service men charged—including Captain Medina—all were acquitted, save one. Lieutenant **William F. Calley**, U.S. Army, the platoon commander, was convicted of 3 counts of murder involving approximately 100 unnamed civilians; LT Calley served just over 6 years of the life sentence awarded at his General Court-Martial. United States v. Calley, 46 C.M.R. 1131 (1973); 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); overturned, 382 F. Supp. 650 (M.D. Ga. 1974); reaffirmed, 519 F.2d 184 (5th Cir. 1975; cert. denied, 425 U.S. 911 (1976).

In July 1995, the International Tribunal for the Former Yugoslavia (the first war crimes tribunal to be convened since the Nuremberg and Tokyo trials) indicted General **Ratko Mladic**, Commander, Bosnian Serb Forces. The gravamen of the Indictment is that between April and May of 1992, Bosnian Serb forces under the command of General Mladic, in concert with members of a paramilitary group known as "Arkan's Tigers," herded over 5,000 Muslim civilians into Luka Camp. Within a period of six weeks, approximately 3,000 Muslims were brutally beaten and killed at the camp, as part of an "ethnic cleansing program." To date, General Mladic has not surrendered to the Tribunal. Prosecutor of the Tribunal Against Ratko Mladic, Indictment, International Criminal Tribunal for the Former Yugoslavia (July 1995).

Despite orders to the contrary, on September 30, 1994, Captain **Lawrence Rockwood**, U.S. Army, an counterintelligence officer for Joint Task Force 190, left his assigned place of duty at the Light Industrial Complex in Port-au-Prince, Haiti, and demanded to inspect the National Penitentiary for suspected human rights abuses. Although a subsequent investigation established that serious violations of human rights had occurred at the Penitentiary, Captain Rockwood was charged and found guilty of, *inter alia*, disobedience to orders. His case became the *cause celebre* for numerous human rights organizations. United States v. Rockwood, No. 9500872 (10th Mountain Division, 8-14 May 1995 (publication forthcoming)).

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HUMANITARIAN OPERATIONS AND OPERATIONAL LAW: NEW "HOOPLA"* FOR THE COMMANDER

INTRODUCTION

Few commanders would disagree that a staff judge advocate's primary duty is to "keep the boss out of trouble." For the most part, this can be accomplished by explaining to the commander--in the simplest terms possible--the legal issues and applicable law for any given situation. This enables the commander to make a fully informed decision based upon sound, but understandable, legal advice. In keeping with this philosophy, what follows is basic guidance concerning operational law as it applies to humanitarian operations in countries torn by internal strife.

Strictly speaking, there is no "humanitarian operations-operational law," or "HOOPLA." *That* is precisely the problem. The disappearance of a large conventional military threat, coupled with the abounding poverty of millions, the explosion of ethnic conflicts, and countless acts of transnational violence, resulted in a new focus for the United States. Increasingly, U.S. forces are tasked to perform "other than war" operations in areas where the most prevalent and vicious armed threats to human life erupt from *within*, rather than *between*, existing states.¹ Awareness of the unique challenges presented by these "dirty little non-wars," stimulated a dramatic review of military doctrine². However, despite a growing recognition that the law of armed conflict does not adequately address situations of internal violence,³ there has not been a concomitant review of the laws applicable to these contemporary conflicts.

* "(hu-pla): 2. bewildering language." Webster's Geographical Dictionary, rev. ed. (1964), s.v. "hoopla."

Equally troublesome, is the tendency of commanders and lawyers alike, to blur the dichotomy between international and internal armed conflicts, and the distinction between the *humanitarian component*⁴ of the law of armed conflict (LOAC) and international human rights law (IHRL). Imprecise "umbrella" terms like "peace operations"⁵ and "humanitarian law," might suffice for doctrinal purposes. However, absolute clarity is required to correctly determine the legal constraints applicable to the mission.

Why should the commander be concerned about the issues raised above? The commander needs to know how to instruct the altruistic captain who encounters atrocities in the penitentiaries of Haiti; otherwise, "Rockwood cases" will reoccur. To avoid mission creep,⁶ the commander needs to know that by acting as a human rights police force, he may create legal obligations under international law. Finally, the commander needs to know that under certain circumstances, failure to redress human rights abuses can result in personal criminal responsibility.

Assuming an unequal knowledge base, this paper starts at the very beginning: the source and evolution of all international law. Building upon that foundation, the law of armed conflict and international human rights law are introduced, followed by a discussion concerning the interplay between these two bodies of law. Finally, within the context of the four background cases provided, this paper concludes with an examination of the law applicable to humanitarian operations where the conflict is limited to internal violence--what this author has coined HOOPLA--and its impact on the operational commander.

Sources of International Law

[L]aws are regulations and institutions. Those who excel in war first cultivate their own humanity and justice, and maintain their laws and institution. Tu Mu ⁷

Consent. The source of all international law is consent. This is because the subjects of international law are states, which are sovereign. Consent can be explicitly provided through the ratification of treaties, or tacitly implied through the development of customary law. Both methods of consent play a considerable role in imposing legal obligations upon the international community, and hence, the development of international law.

Treaties⁸ are analogous to both legislation and contracts: like domestic legislation, treaties state rules regulating conduct; like private contracts, treaties are binding only upon the countries that are party to the agreement. Understand, however, that due to our Constitution, once the United States has ratified a treaty, the provisions of the agreement become a part of federal law that must be adhered to by all American citizens.⁹

Customary law. As indicated above, the second major source of international law is "customary law." Custom refers to conduct, or the conscious abstention from certain conduct, of members of a society which becomes in some measure a part of the legal order of that society. When such a practice attains a degree of regularity and is accompanied by general acceptance among nations, it can be said to have become an international rule of customary law, binding upon all nations.

Secondary sources. The law is not static, it evolves. For explanatory purposes, consider a municipal law prohibiting speeds in excess of the posted limit. Despite the

apparent clarity of this law, a traffic court magistrate might determine that the maximum limit should not apply in certain exigent circumstances (e.g., a life-threatening medical emergency). By so ruling, the magistrate in this example expanded the rules without changing the law "on the books." So it is with international law. Resolution of ambiguities concerning the meaning of various provisions of treaty agreements, or the precise content of customary law, adds to the development of the body of international law. In addition to judicial decisions, these "secondary sources" of the law include U.N. resolutions,¹⁰ and scholarly writings.¹¹

The Law of Armed Conflict

Rules to reduce the suffering to humans and the damage to the environment, are as old as war itself. Indeed, many of the provisions in the modern law of war are derived directly from some of the earliest formulations of rules regulating warfare.¹²

Contemporary LOAC has two basic components: rules which are primarily related to controlling the means and methods of warfare (e.g., the Hague Regulations of 1907¹³), and rules which address, for the most part, the protection of victims of war. The principal source of this latter component are the four Geneva Conventions of 1949,¹⁴ and the two 1977 Protocols Additional to these treaties. Most Member States of the United Nations, including the United States, have ratified the four Geneva Conventions.

Moreover, important parts of these Conventions are considered to have acquired the status of customary international law, thus making them obligatory for states that are not parties to these instruments.¹⁵ However, fewer than half of the Member States--including the

United States--have ratified the two Protocols Additional to the Geneva Conventions.¹⁶

Accordingly, this discussion is limited to the rules mandated by the Geneva Conventions.

International armed conflict. The principal purpose of the 1949 Geneva Conventions was to establish humanitarian rules applicable to *international armed conflicts*. This is evident from the language of common Article 2 of the Conventions:

[T]he present Convention shall apply to all cases of declared war or any other armed conflict which may arise *between two or more* of the High Contracting Parties, even if the state of war is not recognized by one of them. (Emphasis added.)

As indicated by the subject headings of the treaties, certain groups of individuals are protected by the Geneva Conventions (e.g., sick and wounded members of the armed forces, prisoners of war, and so on). Additionally, the Fourth Geneva Convention, which seeks to protect civilian populations, establishes a detailed code of conduct for the Occupying Power.

To ensure compliance with the obligations of the Geneva Conventions, Article 8 of Geneva Convention I, II, and III, and Article 9 of Geneva Convention IV, provides for supervision by "Protecting Powers." Each party to an international armed conflict must agree to the designation of a Protecting Power; if agreement cannot be reached, the International Committee of the Red Cross (ICRC) (or another comparable and impartial humanitarian organization) may fill the role. Protecting Powers are empowered to perform a variety of functions, including inspections of prisoner of war camps, places of internment or detention, and civilian work sites. Additionally, although there is no mandatory system of arbitration, Protecting Powers may "lend their good offices with a

view to settling disagreements." (Geneva Conventions I, II, and III, Art. 11; Geneva Convention IV, Art. 12.)

Internal conflicts. The protective powers of the Geneva Conventions described above *only apply to "international" armed conflicts*. Where conflicts are limited to internal violence, common Article 3 of the Geneva Conventions may be relevant.

Article 3, which is contained in all four Geneva Conventions, obligates the parties to apply a minimum set of humanitarian safeguards to "persons taking no active part in the hostilities." Prohibited are acts of murder, mutilation, cruel treatment, torture, and the taking of hostages, and due process is required before the passing of sentences. However, there is no provision for Protecting Powers to investigate alleged human rights violations (although the ICRC is permitted to *offer* its services to the parties of the conflict.) Moreover, with the exception of the Genocide Convention, there is no provision for an international penal tribunal to adjudicate alleged Article 3 violations. Indeed, until the Mladic indictment (discussed in further detail infra), it was generally accepted that a violation of common Article 3 protections did *not* constitute a war crime under the LOAC.¹⁷

Another troubling aspect of Article 3 is the lack of agreement as to what constitutes an "armed conflict not of an international character." Clearly, full-scale civil war is covered by Article 3. However, at what point does a civil disturbance (e.g., rioting) rise to the level of an Article 3 conflict? Not only is the law unsettled in this area, governments have shown reluctance at characterizing insurgencies as Article 3 conflicts, lest they enhance the status of the insurgents vis-à-vis their official

recognition.¹⁸ This reluctance is puzzling in light of the last paragraph of Article 3, which states that application of minimum safeguards "shall not affect the legal status of the Parties to the conflict."

International Human Rights Law

Origin of the law. The development of international human rights law is directly attributable to the atrocities of World War II. This is evident by the preamble of the United Nations Charter, which was completed to "save succeeding generations from the scourge of war," and to "reaffirm faith in...the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."¹⁹ The cornerstones of IHRL are the human rights provisions contained in the U.N. Charter, and the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948.²⁰

U.N. Charter. The obligations of Member States regarding human rights are set out in Articles 55 and 56 of the U.N. Charter. Unfortunately, these provisions are vague; they basically require States to cooperate with the United Nations in the promotion of human rights. Despite its vagueness, a significant consequence of the U.N. Charter was the "internationalization" of human rights. That is, adherence to the Charter requires the recognition that human rights are an international concern, no longer within the exclusive domestic jurisdiction of any Member State.²¹

The Universal Declaration of Human Rights. The Universal Declaration of Human Rights proclaims two broad categories of rights: 1) civil and political rights, and

2) economic, social, and cultural rights.²² However, the Universal Declaration is not a treaty; it was adopted by the General Assembly with the intent of providing "a common understanding" of fundamental freedoms. Moreover, the Declaration recognizes that the rights it proclaims are not absolute; rather, they are aspirational. Nevertheless, reliance upon the Declaration over the past five decades, has resulted in adoption of many of the provisions into customary law.²³ Although this area of the law remains highly unsettled, one authoritative source lists the following governmental practices as violating customary international law: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination.²⁴

Other human rights agreements. Although it took 26 years from its inception in 1966, to ratification in 1992, the United States is now a party to the Covenant on Civil and Political Rights.²⁵ This treaty binds the United States to "ensure [that] all individuals within its territory and subject to its jurisdiction" are afforded basic human rights (e.g., the right to life, liberty, and security) "without distinction...of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Additionally, the United States is obligated to ensure that its populace is not "subjected to torture, or to cruel, inhuman, or degrading treatment or punishment" (Article 7) or "arbitrary arrest or detention." (Article 9).

There are a host of other important human rights instruments that the United States has not ratified (e.g., the International Convention on the Elimination of All Forms of Racial Discrimination; The Genocide Convention; etc.). Although the United States has

yet to ratify the American Convention on Human Rights, by virtue of its status as a Member State of the Organization of American States (OAS), the United States is legally obligated to adhere to the human rights provisions contained in the OAS Charter.

Interplay Between LOAC and IHRL

The preceding sections introduced the "humanitarian" component of the law of armed conflict, followed by international human rights law; it is important not to confuse these two bodies of law. To assist in clarification, think of the concept of "rights" in connection with its corresponding concept of "obligation." During an international armed conflict, rights are granted to states and to certain protected groups; the corresponding obligation falls upon the enemy state. When international human rights are involved, the right is afforded to the individual, and the corresponding obligation is generally incurred by the state with jurisdiction over the individual.

Professor Yoram Dinstein, a world-renowned human rights scholar, schematically illustrated the complexity and interplay of human rights protections in peacetime and wartime. As Table 1²⁶ illustrates, some rights exist at all times, regardless of whether there is peace, international armed conflict, or internal strife (Variation 2, e.g., the right not to murdered). Given the special circumstances of war, some rights only exist during armed conflict (Variation 3, e.g., freedom from compulsory service in the Occupying Power's armed forces). The exigencies of war can compel a government to suspend or severely limit a peacetime right (Variations 1 and 5, e.g., freedom from arbitrary

detention). Finally, during times of war, there may be a heightening of peacetime rights (Variation 6, e.g., the right not to be subjected to medical experimentation).

Table 1		
Human Rights Applicable		
Variation	In Peacetime	In Wartime
1	X	O
2	X	X
3	O	X
4	O	O
5	X	X Minus
6	X	X Plus

Note: X represents a human right and O represents its absence.

A Pragmatic Look at HOOPLA

Modern military operations other than war can be the setting for crimes no less vicious than those prosecuted at Nuremberg. The blood running in the Sava River today is no less red than the blood carried by the same river in 1941.²⁷

In light of the above discussion, consider how the LOAC and IHRL rights and obligations might be applicable during an actual conflict. For comparative purposes, the first case involves an international armed conflict:

General Yamashita. In 1945, Japan, as an Occupying Power, had an obligation under the LOAC to ensure that its soldiers did not commit atrocities against the Filipino civilian population and American prisoners of war (POW) on the Philippine Islands.

(Neither the IHRL nor the Geneva Conventions were then in effect, however, torture of civilians and POWs by the enemy was prohibited under the Hague Conventions.)²⁸ The rights afforded by the Hague Convention were conveyed to the belligerent state and to protected individuals. Thus, by beating, torturing, and murdering citizens and POWs, Japan violated the LOAC rights of the United States, the Philippines (as a dependency of the United States), and 32,000 individual victims.

The Yamashita trial significantly contributed to the body of international criminal law in setting a standard by which commanders could be held responsible for the war crimes of subordinates. That is, General Yamashita was convicted of war crimes even though he did not personally commit any of the alleged atrocities, nor order their commission. Indeed, there was no evidence that he had any knowledge of the commission thereof, by members of his command. The Yamashita principle of command criminal responsibility is still regarded as authoritative today.²⁹ However, as the next case demonstrates, it is unclear what degree of knowledge (the *mens rea* element) the commander must have before he assumes an affirmative duty to act.

Captain Medina and Lieutenant Calley. The Vietnam War presents an interesting academic issue: was this an international armed conflict between the states of North and South Vietnam, or a South Vietnamese civil war with North Vietnamese intervention and American counter-intervention? If the former, Captain Medina and Lieutenant Calley were eligible under the LOAC for indictment by an international war crimes tribunal. If the latter, the protections of common Article 3 were applicable. However, common Article 3 does not provide a basis for universal penal jurisdiction, and in the 1970s (when

the My Lai cases were tried), the Article 3 basis for individual criminal responsibility under the LOAC was uncertain. The obligations of IHRL did not flow to the United States, because U.S. forces were not occupying South Vietnam. As it was, both men were charged with murder under the Uniform Code of Military Justice.³⁰ Accordingly, the above issues were left unresolved.

The Medina and Calley courts-martial had two significant consequences. First, with regard to the *mens rea* (knowledge) element under a theory of command responsibility, the "strict liability" Yamashita standard was not invoked. Rather, the members were instructed that "a commander is...responsible if he has *actual* knowledge...and he wrongfully fails to take the necessary and reasonable steps to ensure compliance with the law of war. (Emphasis added.)"³¹ It is unclear whether the Military Judge committed a simple error in giving this instruction to the members, or whether he intended to avoid the appearance of "vengeance justice," that results from applying the harsh Yamashita standard. The issue of *mens rea* is further complicated by the Court's ruling in light of the Army's standard which was then, and is still, in effect.³² It is highly likely that Captain Medina would have been convicted under the Army's "reasonably should have known" standard. Indeed, this author would advise contemporary commanders to follow the Army standard.

The second significant result of the Medina and Calley courts-martials was a change in policy relative to the application of the LOAC. Despite the Geneva Convention's distinction between international and internal armed conflicts, in response to My Lai, the Department of Defense directed that U.S. armed forces shall apply the

LOAC standards in *all* conflicts, regardless of how "such conflicts are characterized."³³

Moreover, the Department of the Army reduced the complex LOAC rules to a set of nine "Soldiers' Rules,"³⁴ that are to be taught to all entering service members.

The benefit of DoD policy regarding the LOAC is obvious: the nine rules provide concise, comprehensible, and consistent instruction as to what the soldier *cannot* do at any time. However, the rules are deficient in that they provide little guidance as to what the law mandates a soldier *must* do during a particular operation. Exactly how is the soldier to "prevent violations of the law of war," during an internal conflict where the LOAC may not apply? Who are "the enemy combatants," and who are "the enemy prisoners of war?"

General Mladic. The Mladic case illustrates the difficulties encountered in determining the applicable LOAC and IHRL rules when there is no clear state of belligerency (who are "the enemy combatants?") and no clear government or state of occupation (who are "the enemy prisoners of war?"). The significant issue presented in Mladic is whether the alleged atrocities occurred during an international or an internal armed conflict.

General Mladic was charged by the International Tribunal for the Former Yugoslavia with alleged war crimes in connection with the April-May 1992 deaths of approximately 3,000 Muslim civilians detained at Luka Camp, in Brcko, Bosnia-Herzegovina. Should General Mladic appear before the Tribunal, a sharp defense attorney would most likely argue that the LOAC does not apply because the deaths occurred during an internal conflict. That is, in April 1992, Yugoslavia declared it was

comprised of only the Republics of Serbia and Montenegro; the army was formally divided into the Army of Yugoslavia, and the Serbian Army, in Bosnia and Herzegovina.³⁵ Thus, it could be argued, the Muslims were victimized in their own country (Bosnia-Herzegovina), by their own countrymen (the Bosnian-Serb Army and Serbian paramilitaries), in an internal conflict.

On the other hand, given the actions of the U.N. Security Council, it could be argued that the distinction between international and internal armed conflicts is no longer valid under the LOAC. Evidently, the Security Council deemed the hostilities in the region a sufficient threat to international peace and security, to necessitate creation of a tribunal under Chapter VII of the U.N. Charter. More importantly, the Council adopted a procedural statute that defined the tribunal's subject matter jurisdiction as including adjudication of common Article 3 violations.³⁶ The significance of this action is astronomical: violations of common Article 3 may now constitute war crimes under the LOAC, punishable by an international penal tribunal.

Captain Rockwood. The final, and perhaps most perplexing case to consider is United States v. Rockwood. Captain Rockwood correctly believed that heinous violations of human rights were occurring in the Port-au-Prince National Penitentiary, Haiti. Against orders not to depart the secure compound, Captain Rockwood went to the Penitentiary and demanded to personally inspect the facility. At his General Court-Martial, Captain Rockwood was found guilty of leaving his place of duty, disrespect to a superior officer, and disobedience to orders; he was sentenced to a dismissal and full forfeiture of pay and allowances. Captain Rockwood's lengthy and complex trial centered

upon the applicability of the LOAC and IHRL to the activities of the U.S. forces deployed on Operation Uphold Democracy, and the moral and legal obligations of individual members of that force. Thus, Rockwood brings to a head all of the legal issues presented in this paper.

Captain Rockwood plead "not guilty" to the charge of disobedience to orders, and offered the affirmative defense that the order (not to leave the compound) was not lawful because it was contrary to superior orders. Under Article 90 of the Uniform Code of Military Justice, an order is not lawfully binding if it is in conflict with the lawful order of a superior authority. However, to be considered a conflicting order, the order must have been a specific mandate to do (or refrain from doing) a specific act.³⁷ Thus, the issue framed was whether Captain Rockwood was obligated under international law, to investigate credible reports of human rights violations. The Court correctly determined that he was not so obligated.

The first question to be decided by the Court was whether the LOAC applied to Operation Uphold Democracy. The Court determined that it did not: the conflict in Haiti was not an armed conflict. U.S. forces entered Haiti permissively, to conduct a peacekeeping operation.³⁸ Thus, neither the protections of the four Geneva Conventions, nor common Article 3, were invoked by the operation.

Had agreement with Emile Jonassaint not been reached, the multinational forces would have made a non-consensual entry; thus, potentially effecting the outcome in Rockwood. Hence, it is important to remember, that there is growing support for the view that violations of common Article 3 during an armed, internal conflict, may be tried

as war crimes. The U.N. Security Council's actions vis-à-vis General Mladic, is indicative of this trend. Further, the DoD policy of applying the LOAC standards to every operation, may evolve to an accepted customary law.

Having decided that the LOAC did not apply in absence of an armed conflict, the Court wrestled with the issue as to whether U.S. forces had an affirmative duty to investigate alleged human rights abuses under IHRL. As discussed, supra, IHRL obligations are incurred by the government, for the benefit of individuals in its territory *or subject to its jurisdiction*. The issue therefore, was whether U.S. forces in Haiti constituted an Occupying Power. Occupation is defined by the Hague Regulations as follows:

Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.³⁹

Operation Uphold Democracy did not involve either a "hostile army" or a "hostile invasion;" U.S. forces conducted a permissive entry into Haiti pursuant to the agreement between former President Carter and Emile Jonassaint. At no time did the United States render "the invaded government incapable of publicly exercising its authority," nor did it substitute "its own authority for that of the legitimate government" in Haiti.⁴⁰

Since the Court determined that the LOAC was not applicable during Operation Uphold Democracy, and that U.S. forces did not constitute an Occupation Power in Haiti, Captain Rockwood was under no legal obligation to investigate the alleged human rights abuses.

Had the Court determined that Haiti was occupied, the question of command responsibility would have been raised. The occurrence of human rights abuses was common knowledge (thus satisfying the *mens rea* element). However, pursuant to the Carter-Jonassaint agreement, Haitian authorities remained responsible for the prisoners in the penitentiaries.⁴¹ Accordingly, it would not appear that the Haitian guards were under the command of U.S. forces.

CONCLUSION

Military operations "other than war" are critical to our national security strategy of engagement (through the exercise of global leadership and diplomacy) and enlargement (through the promotion of free-election democracies).⁴² Further, there is every indication that U.S. involvement in humanitarian operations will continue in this post-Cold War era. The four cases presented illustrate the legal labyrinth that must be negotiated in determining the law applicable to these contemporary operations. Unfortunately, these cases are also illustrative of the fact that there is no easy formulae that can be applied; HOOPLA is extremely fact-dependent, and at this stage, in a high state of flux. Yet, awareness of the unique issues raised by modern military operations, is the proper place to start.

The commander must be aware that even without separate warring sides, violence in a contested political situation may trigger legal obligations under the growing body of IHRL. Moreover, the commander must understand that should these obligations be triggered, failure to protect the human rights of noncombatants could result in personal criminal liability. Beyond this cautionary advice, the commander will do well to

remember that the operational art concepts of "unity of force," "economy of effort," "restraint," and "perseverance" are legally, morally, and pragmatically consistent with the law of war and human rights law.

NOTES

1. One writer has suggested that since the passage of the U.N. Charter, conflicts falling within the traditional model can be "counted on the fingers of one hand," while low-intensity internal conflicts during this same period "have numbered well over a thousand." John F. DePue, "The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949-Its Impact Upon Humanitarian Constraints Governing Armed Conflict," Military Law Review 75 (1977): 72.
2. See, for example, U.S. Joint Chiefs of Staff, Doctrine for Joint Operations, Joint Pub 3-0 (Washington: 1993); U.S. Joint Chiefs of Staff, Joint Tactics, Techniques, and Procedures for Peacekeeping Operations, Joint Pub 3-07.3 (Washington: 1994); U.S. Joint Chiefs of Staff, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance (Draft); U.S. Air Force Dept., Joint Task Force Commander's Handbook for Peace Operations (Ft. Monroe, VA: 1995); U.S. Army Dept., Peace Operations, Field Manual 100-23 (Washington: 1994); U.S. Navy Dept., Expeditionary Forces Conducting Humanitarian Assistance (Draft).
3. See, generally, Theodor Meron, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards," American Journal of International Law 89 (1995): 195-223.
4. As discussed, *infra*, the Geneva Conventions of 1949, and to a lesser extent, the Hague Regulations of 1907, focus upon protection of victims of war. Hence, they are said to contain an element of "humanitarian" law as it applies to armed conflicts. Increasingly, however, the broad term "humanitarian law" has been used interchangeably in discussions concerning crimes against humanity during war, and violations of peacetime human rights.
5. Joint Pub 3-0, at 11, defines "peace operations" as "[t]he umbrella term encompassing peacekeeping, peace enforcement, and any other military, paramilitary, or nonmilitary action taken in support of a diplomatic peacemaking process."
6. U.S. Army leadership coined the term "mission creep" to describe the phenomenon of political mission expansion (i.e., the U.N.'s assignment of additional tasks to be performed in Somalia). See, Sean A. Kushner, "OOTW: The Winning Role of the U.S. Army," Joint Force Quarterly, March-April 1996, 43-45. However, mission creep can also result from the failure to identify the full scope of the mission.
7. Tu Mu's commentary on Sun Tzu's statement, "Those skilled in war cultivate the *Tao* and preserve the laws and are therefore able to formulate victorious policies." Samuel B. Griffith, ed., The Art of War (New York: Oxford University Press), 88.
8. International agreements are referred to as pacts, protocols, conventions, charters, exchanges of notes, and concordats (agreements between a state and the Holy See), as well as treaties. The terms are fairly interchangeable in legal significance.

9. Article VI of the Constitution of the United States provides that treaties to which the United States is a party, constitute a part of the supreme law of the land, with a force equal to that of law enacted by Congress.

10. Clearly, U.N. resolutions and proposed conventions exercise some influence upon customary international law. Defining the exact measure of that influence, however, is complicated, and still at issue. Should resolutions of the General Assembly, which have only a "recommendatory" character, constitute evidence of a consensus among nations for purposes of defining customary law? If so, how broad a supporting vote (in terms of the number and the importance of the nations involved) should be required? Should unanimous or nearly unanimous resolutions be automatically adopted into general international law?

11. The writings of scholars on issues of international law are not binding, but are persuasive authority.

12. See, for example, Deuteronomy 20:10-20, providing the ancient Hebrews instructions on protections to be afforded to persons and property of an enemy city under siege.

13. The principal agreements of the 1907 Hague Conventions are reprinted in Department of the Army, Treaties Governing Land Warfare, DA Pamphlet 27-1 (Washington: 1956), 5.

14. The four Geneva Conventions of 1949 are: U.S. Treaties, etc., "The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," United States Treaties and Other International Agreements, entered into force 1950, TIAS 3362 (Washington: U.S. Dept. of State, 1949); U.S. Treaties, etc., "The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea," United States Treaties and Other International Agreements, entered into force 1950, TIAS 3363 (Washington: U.S. Dept. of State, 1949); U.S. Treaties, etc., "The Geneva Convention Relative to the Treatment of Prisoners of War," United States Treaties and Other International Agreements, entered into force 1950, TIAS 3364 (Washington: U.S. Dept. of State, 1949); and, U.S. Treaties, etc., "The Geneva Convention Relative to the Protection of Civilian Persons in Time of War," United States Treaties and Other International Agreements, entered into force 1950, TIAS 3365 (Washington: U.S. Dept. of State, 1949).

15. See, Theodor Moron, "The Geneva Conventions as Customary Law," American Journal of International Law 81 (1987): 348.

16. Ibid.

17. See, Mark S. Martins, "'War Crimes' During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg--and Beyond," Military Law Review 149 (1995): 169.

18. See generally, Theodor Meron, "Extraterritoriality of Human Rights Treaties," American Journal of International Law 89 (1995): 78-82.

19. U.S. Treaties, etc., "Charter of the United Nations," United States Treaties and Other International Agreements, entered into force 1945, TIAS 993 (Washington: Department of State, 1945).
20. United Nations, General Assembly, Official Records: Resolutions and Decisions Adopted by the General Assembly during Its One Hundred and Eleventh Session, 1948. Resolution 111/217, A/111 (New York: 1948).
21. L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," American University Law Review 32 (1982): 1-17.
22. Civil and political rights include: the right to life, liberty, security, privacy, due process of law, and ownership of property; the prohibition of slavery, torture, and cruel or inhuman treatment, and application of *ex post facto* laws and penalties; and freedom of speech, religion, assembly, movement, and self-determination. Economic, social, and cultural rights include: the right to social security, employment, unemployment protection, equal and just pay, rest and leisure, education, and the right to freely participate in the cultural life of the community.
23. L. Sohn, 15.
24. West Publishing, Restatement of Law (Third), § 702.
25. U.S. Treaties, etc., International Covenant on Civil and Political Rights, entered into force for the United States 1992, UNTS 171 (Washington: U.S. Dept. of State, 1992).
26. Yoram Dinstein, "Human Rights in Armed Conflict," in Human Rights in International Law: Legal and Policy Issues ed. Theodor Meron (New York: Oxford University Press, 1985), 351.
27. Martins, at 187.
28. See, note 13, supra, Hague Convention No. IV, Respecting the Laws and Customs of War on Land.
29. See, U.S. Department of the Army, The Law of Land Warfare, Field Manual 27-10, para. 501 (Washington: 1956) (C1, 15 July 1976), which provides:
The commander [is responsible for the acts of subordinates] if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.
30. Uniform Code of Military Justice, Article 118 (Murder), 10 U.S.C. § 918 (1976).
31. Quoted in, William Eckhardt, "Command Criminal Responsibility," Military Law Review 97 (1983): 1, at 15.

32. See, U.S. Army Dept., The Law of Land Warfare, Field Manual 27-10, para. 501 (Washington: 1956) (Ch 1, 15 July 1976).

33. Department of Defense, DoD Law of War Program, DoD Directive 5100.77 (Washington: 1979), 2.

34. Department of the Army, Training in Units, AR 350.41, ch. 14 (Washington: 1993), provides the following LOAC rules:

- 1) Soldiers fight only enemy combatants.
- 2) Soldiers do not harm enemies who surrender.
Disarm them and turn them over to your superior.
- 3) Soldiers do not kill or torture enemy prisoners of war.
- 4) Soldiers collect and care for the wounded, whether friend or foe.
- 5) Soldiers do not attack medical personnel, facilities, or equipment.
- 6) Soldiers destroy no more than the mission requires.
- 7) Soldiers treat all civilians humanely.
- 8) Soldiers do not steal. Soldiers respect private property and possessions.
- 9) Soldiers should do their best to prevent violations of the law of war.
Soldiers report all violations of the law of war to their superiors.

35. Martins, 158.

36. United Nations, Security Council, Official Records: Resolutions and Decisions of the Security Council, 1993, Resolution 827 (1993), S/RES/827 (New York: 1993).

37. In addition to the international law argument, the defense argued that the order was superseded by President Clinton's speech indicating that our national objectives in Haiti included "stopping brutal atrocities." This argument was quickly dismissed, because the general guidelines contained in the President's speech were not considered a specific mandate to do a specific act. See, United States v. Rockwood, supra.

38. See, Agreement Signed by Jimmy Carter and Emile Jonassaint, the Military-Appointed President of Haiti, in Port-au-Prince, on 18 September 1994, reprinted in Center for Law and Military Operations, "Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates," (Charlottesville, VA: 1995).

39. See, Hague Regulations, para. 355, supra, note 13.

40. See, Meron, supra, note 18, at 78. In his article, Professor Meron conceded that the U.S. entry was "consent-based, nonviolent, and hostilities-free," thus, the LOAC protections were not "strictly speaking, applicable."

41. See, Carter-Jonassaint Agreement, para. 2 and 4, supra, note 38.

42. The White House, A National Security Strategy of Engagement and Enlargement (February 1995).

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